Supreme Court, U.S.
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No. 09-1178

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMY SMITH,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the
District Court of Appeal, First District of Florida

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully Submitted,

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QUESTIONS PRESENTED

This Court has requested that the State respond to the Petition. Petitioner states the questions presented as:

> 1. Whether the Petitioner's guilty plea was invalid and not knowing, intelligent, and voluntary as required by the Due Process Clause of the Fourteenth Amendment to the Constitution because the Petitioner was incompetent at the time of the plea hearing.
>
> 2. Whether the Due Process Clause of the Fourteenth Amendment to the Constitution requires a court to conduct a competency evaluation prior to accepting a guilty plea from a criminal defendant when the record affirmatively establishes that the defendant suffers from "severe" mental health issues.

(Pet. i.). Respondent restates the questions presented as:

> 1. Whether the trial court's acceptance of Petitioner's negotiated plea of guilty violates the Due Process Clause of the Fourteenth Amendment where the court is made aware that the defendant has had mental health issues but has been deemed competent to proceed by a

defense expert and in light of the court's interaction with Petitioner during the plea colloquy.

2. Whether the Due Process Clause of the Fourteenth Amendment requires a court to *sua sponte* order a competency evaluation prior to accepting a guilty plea from a criminal defendant where the court is made aware that the defendant has had mental health issues but has been deemed competent to proceed by a defense expert.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner, Jeremy Smith, seeks review of the decision of the District Court of Appeal, First District of Florida, affirming his conviction and sentence, *per curiam* and without opinion, found at Smith v. State, 22 So. 3d 544 (Fla. 1st DCA 2009) (Table).

JURISDICTION

Because the District Court of Appeal, First District of Florida's decision was a *per curiam* decision affirming without opinion, Petitioner was precluded from seeking discretionary relief in the Florida Supreme Court. *See* Art. V, § 3(b), FLA. CONST.; Jollie v. State, 405 So. 2d 418, 421 (Fla. 1981); Jenkins v. State, 385 So. 2d 1386, 1389 (Fla. 1980). Accordingly, the District Court of Appeal, First District of Florida was the state court of last resort. Therefore, this Court appears to have jurisdiction pursuant to Title 28, United States Code, Section 1257(a).

CONSTITUTIONAL PROVISIONS

As to both Questions Presented, the pertinent constitutional provision is the Fourteenth Amendment of the United States Constitution which provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. CONST. Amend XIV.

STATEMENT OF THE CASE AND FACTS[1]

At proceedings held June 27, 2006, pursuant to written agreement, Petitioner entered a negotiated plea of guilty to murder in the second degree, a lesser offense, in violation of Section 782.04(2), Florida Statutes (2005), in exchange for a term of 40 years' imprisonment with credit for time served to be followed by 10 years' probation. (R 19-20, 96-131). Petitioner did not take a direct appeal.

On July 18, 2007, Petitioner filed a *pro se* post-conviction motion in the state circuit court pursuant to Florida Rule of Criminal Procedure 3.850 asserting three claims of ineffective assistance of trial counsel alleging: (1) failure to properly advise him on the option of pleading not guilty by reason of insanity, (2) encouraging him to plead guilty by misleading him to believe he would receive a sentence better than 25 years' to life, and (3) failing to discover and argue in the trial court that he should receive "considerable mitigation" due to his mental health status. (R 1-15). This post-conviction motion was summarily denied by the state circuit court by order on August 3, 2007. (R 16-53). Petitioner did not appeal therefrom.

Thereafter, on August 25, 2008, through counsel,

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[1] Citations herein reference the Record on Appeal in the Florida District Court of Appeal, First District, which will be referenced as "R," followed by appropriate page number. Additionally, the single Supplemental Volume will be referenced as "R Supp.," followed by appropriate page number. Petitioner's Initial Brief in the Florida appellate court will be referenced as "IB," followed by the appropriate page number.

Petitioner filed a second post-conviction motion in the state circuit court pursuant to Florida Rule of Criminal Procedure 3.850 asserting various claims for collateral relief under three issue headings.[2] (R 60-75; R Supp 11). Under Ground 1, post-conviction counsel alleged that Petitioner's guilty plea was not knowing and voluntary due to mental illness or, in the alternative, that trial counsel was ineffective in failing to properly evaluate his mental illness, argue his incompetence, and request a competency hearing pursuant to Florida Rule of Criminal Procedure 3.210. (R 64-67). In support thereof, post-conviction counsel represented that he had retained a forensic psychiatrist, Dr. Darren M. Rothschild, who had evaluated Petitioner and concluded that Petitioner was not competent at the time he entered his guilty plea. (R 64-67). Therein, post-conviction counsel represented that Dr. Rothschild was then in the process of finalizing his written conclusions on Petitioner's competency and he would be filing a motion with his Rule 3.850 motion for leave to supplement with Dr. Rothchild's written conclusions. (R 57-59, 65 n.4). Under Ground 2, post-conviction counsel alleged that Petitioner's trial counsel was ineffective in failing to properly advise

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[2] On August 26, 2008, in conjunction with this Rule 3.850 post-conviction motion, pursuant to Carter v. State, 706 So. 2d 873 (Fla. 1997) and Florida Rule of Criminal Procedure 3.851, collateral counsel filed a motion in the state circuit court for determination of Petitioner's competency. (R 54-56). By order dated September 29, 2008, the court denied this motion on the ground that this non-capital case is not controlled by Carter. (R 83)

him regarding and failing to pursue meritorious defenses, including insanity, self-defense, and lack of intent. (R 67-70). Under Ground 3, post-conviction counsel alleged that Petitioner was incompetent at the time of his previous Rule 3.850 post-conviction proceeding and, therefore, was unable to appeal the denial of relief. (R. 71-72).

On September 22, 2008, collateral counsel filed a motion in the state circuit court for leave of thirty days to supplement the above Rule 3.850 post-conviction motion with Dr. Rothschild's as yet unfinished final written conclusions, (R 76-78), which was granted, (R 79-82). On October 29, 2008, collateral counsel filed another motion in the state circuit court for leave of thirty days to supplement the above Rule 3.850 post-conviction motion with Dr. Rothschild's still as yet unfinished final written conclusions, (R 85-87), which was granted, (R 88). On December 5, 2008, collateral counsel filed a motion in the state circuit court to compel the Duval County Sheriff's Office to release the medical records of Petitioner for those dates he was housed at the detention facility prior to sentencing to allow Dr. Rothchild to complete his written report.[3] (R 89-91).

By written order, on December 16, 2008, the state circuit court summarily denied Rule 3.850 post-conviction relief without evidentiary hearing. (R 92-132). Therein, after identifying Strickland v. Washington, 466 U.S. 668 (1984), as the appropriate

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[3] The state circuit court does not appear to have ruled upon this motion to compel.

standard governing claims of ineffective assistance of counsel, the court ruled in pertinent part:

> In his Motion, the Defendant alleges ineffective assistance of counsel because his attorney failed to convey information to determine and investigate the Defendant's competence and the possible defenses including insanity and self-defense. Both these allegations are directly rebutted by the record. (Exhibit "C") A defendant may not seek to go behind his sworn testimony at a plea hearing in a post conviction motion. Stano v. State, 520 So. 2d 278 (Fla. 1988); Dean v. State, 580 So. 2d 808 (Fla. 3d DCA 1991); Bir v. State, 493 So. 2d 55 (Fla. 1st DCA 1986). Therefore, this Court finds that the Defendant has failed to establish error on the part of counsel or prejudice to his case. Strickland, 466 U.S. 668. The Defendant has also alleged his incompetence at a previous post conviction proceeding. As this Court has not stricken this pleading for being successive, that argument is without merit. The Defendant's only ground for relief is denied.

(R 92-93).[4] Collateral counsel filed a motion for rehearing on December 30, 2008, asserting the absence

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[4] Attached as exhibits to the circuit court's order are an excerpt from Petitioner's written plea agreement, the written judgement and sentence, and a complete transcript of plea proceedings held June 27, 2006. (R 95-132)

of Dr. Rothschild's final report, delayed by an inability to obtain Petitioner's Duval County jail medical records, but providing for first time as an attachment thereto a "preliminary report" of Dr. Rothschild prepared upon collateral counsel's request after rendition of the above December 16, 2008, order summarily denying post-conviction relief. (R 133-142). On January 8, 2009, the state circuit court summarily denied rehearing without comment. (R 143).

Through counsel, Petitioner appealed to the Florida First District Court of Appeal, (R 144-145), filing an initial brief asserting error in the lower court's denial of his motion for a competency determination and in summarily denying his Rule 3.850 post-conviction claims by failing to attach records which conclusively refute his claims. (IB 6-24); see Fla. R. App. P. 9.141(b)(2)(D). Without comment, the Florida appellate court *per curiam* affirmed the judgement of the lower tribunal without opinion. Smith v. State, 22 So. 3d 544 (Fla. 1st DCA 2009)(table).

REASONS FOR DENYING THE WRIT

Question Presented 1

> Whether the trial court's acceptance of Petitioner's negotiated plea of guilty violates the Due Process Clause of the Fourteenth Amendment where the court is made aware that the defendant has had mental health issues but has been deemed competent to proceed by a defense expert and in light of the court's interaction with Petitioner during the plea colloquy. (Restated).

To accept a guilty plea, there must be an affirmative showing that it is entered intelligently and voluntary. Boykin v. Alabama, 395 U.S. 238, 241 (1969). As reiterated in North Carolina v. Alford, 400 U.S. 25 (1970): "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Id., 400 U.S. at 31. Further, as defined in Dusky v. United States, 362 U.S. 402 (1960), the established standard for competency is whether the defendant has "a rational as well as factual understanding of the proceedings against him" and "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." Id., 362 U.S. at 402; see Drope v. Missouri, 420 U.S. 162 (1975).

As codified by statute, Florida utilizes the Dusky/Drop standard for competency. § 916.12(1), Fla.

Stat. (2006); see Hill v. State, 473 So. 2d 1253, 1256-1257 (Fla. 1985). Further, by Rule in Florida, when counsel for an indigent or partially indigent defendant has "reason to believe that the defendant may be incompetent to proceed ..., counsel may so inform the court who shall appoint 1 expert to examine the defendant in order to assist counsel in the preparation of the defense. The expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." Fla. R. Crim. P. 3.216(a).[5] As indicated during the plea colloquy of June 27, 2006, quoted below, Rule 3.216(a) was invoked by counsel for Petitioner in the present case. (R 117).

Here, specifically contending that his guilty plea was not knowing, intelligent, and voluntary as a result of his incompetency, Petitioner contends that certiorari is appropriate in this case where "[t]here were several warning signs or 'red flags' that were ignored by the trial court, such as the Petitioner's 'severe' mental health issues, the Petitioner's failure to take his medications at the time of his guilty plea, and the absence of any written documentation or oral testimony from mental health experts stating that the Petitioner was competent." (Pet. 18). In support of these contentions, Petitioner relies upon a brief excerpt

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[5] Petitioner's plea was taken on June 27, 2006; thus, amendments to Rule 3.216(a), effective January 1, 2010, which limited its application to indigent or partially indigent defendants *not* represented by the public defender, did not apply. See Amendments to the Fla. Rules Crim. P., 26 So. 3d 534, 543 (Fla. 2009).

from his June 27, 2006 plea colloquy and an incomplete *post hoc* mental evaluation of Petitioner by a Dr. Darren Rothschild, contracted on Petitioner's behalf specifically for use in collaterally attacking his plea. (Pet. 12-20).

As to the latter basis of support, in Ground 1 of the Rule 3.850 motion filed in the state circuit court on August 25, 2008, post-conviction counsel represented:

> ... Dr. Rothschild recently evaluated the Defendant. Based on his evaluation, Dr. Rothschild has concluded that the Defendant suffers from a severe mental illness and the Defendant was not competent at the time he entered his guilty plea in this case.[n.3] ....
>
> > [n.3] "In order to be competent to enter a guilty plea, a defendant must be able to consult with his attorney with a reasonable degree of rational understanding and must have a rational as well as factual understanding of the proceedings against him." *Gonzales v. Tafoya*, 515 F.3d 1097, 1118 (10th Cir. 2008). Dr. Rothschild has concluded that the Defendant did not meet this standard of competency at the time of the June 27, 2006, plea hearing.

(R 65)(underscore added). In contrast, the "preliminary report" of Dr. Rothschild dated December 23, 2008 and submitted by collateral counsel for the

first time to the state court as an attachment to a motion for rehearing of its denial of post-conviction relief, states:

> Per your request, I am submitting a preliminary report of my evaluation of Mr. Smith, which you had requested to determine whether mental health issues might be the basis for appellate claims in the above referenced case. You specifically requested that I evaluate the following:
>
> 1.) Mr. Smith's competence to proceed at the time he submitted a motion for postconviction relief.
>
> 2.) Mr. Smith's competence to proceed at the time he changed his pleas to guilty.
>
> 3.) Whether Mr. Smith met Florida's statutory criteria for a defense of Not Guilty by Reason of Insanity.
>
> As you are aware, although I evaluated the defendant (for approximately four and a half hours), interviewed his family, reviewed all available records, and communicated with Dr. Meadows (prior evaluator), I have not completed the evaluation nor formed conclusions on the latter two issues because I am awaiting receipt of critical, collateral information (particularly the Duval County Jail medical records).
>
> * * *

(R 139)(underscore & bold added).

Nevertheless, despite it being clear therefrom

that Dr. Rothschild had not completed his evaluation of Petitioner nor formed a conclusion as to "Mr. Smith's competence to proceed at the time he changed his pleas to guilty[,]" on appeal in the Florida First District Court of appeal, referencing this very preliminary report and citing his Rule 3.850 post-conviction motion, collateral counsel continued to represent in his initial brief to the Florida appellate court that "Dr. Rothschild concluded that Appellant Smith suffers from a severe mental illness and Appellant Smith was not competent at the time that he entered his guilty plea in this case." (IB 12-13)(footnote omitted); U.S. SUP. CT. R. 15.2 ("Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."). Again, although expressly contradicted by the very report on which he relies, in his attempt to obtain certiorari in this Court, Petitioner persists in representing: "In his report, Dr. Rothschild concluded that the Petitioner suffers from a severe mental illness and the Petitioner was not competent at the time that he entered his guilty plea in this case." (Pet. 6); U.S. SUP. CT. R. 15.2.

As with the above inaccurate representations, attempting to influence this Court to grant certiorari, Petitioner also represents that his "failure to take his medications at the time of the guilty plea" was one of several "warning signs" of incompetency ignored by the trial court. (Pet. 18)(underscore added). However, the state court record reflects only that Petitioner had then been taken off psychotropic medications "at the doctor's direction from the jail." (R 117)(underscore added); U.S. SUP. CT. R. 15.2. Even the incomplete preliminary

report of Dr. Rothchild so states. (R 141). Further, Petitioner's assertion that Dr. Rothchild's incomplete report refutes defense counsel's representation at the plea hearing that his doctor did not disagree with the decision to discontinue medications prior to his change of plea, is unsupported. (Pet. 9 n.5, 20; R 117, 141). The portion of the preliminary report of Dr. Rothschild on which Petitioner relies identifies a Dr. William Meadows as a forensic psychologist who had evaluated Petitioner for competence on several occasions and that "Dr. Meadows was not aware ... if antipsychotic medications were continued or stopped prior to the plea change." (R 141). However, as the *confidential* doctor referenced by defense counsel is not identified at the plea hearing (quoted below), nor does the state court record otherwise identify his confidential doctor, Petitioner's assertion is presumptive, at best. (R 117); U.S. SUP. CT. R. 15.2.

Still further, as opposed to the brief excerpt on which Petitioner relies, the full record of plea proceedings does not support his assertion that the trial court ignored his mental health issues in accepting his plea. (Pet. 17-18). In pertinent part, after being sworn, Petitioner's lengthy colloquy reflects:

> THE COURT: .... Mr. Smith, your attorney on your behalf has entered a plea of guilty to the charge of -- lesser included charge of second degree murder, has that plea of guilty been entered with your knowledge and consent?
>
> THE DEFENDANT: Yes, sir.

THE COURT: Are you entering that plea of guilty because you feel it's in your best interest to do so?

THE DEFENDANT: Yes.

THE COURT: Do you understand that that charge is a first degree punishable up to life, and that the guidelines are established at 20.6 years to life, it actually comes out to 246 months, is that right?

MR. [PROSECUTOR]: Twenty years and six months, yes, sir.

THE COURT: All right. So, it's 246 months to life, and that roughly is 20 years and six months to life, do you understand?

THE DEFENDANT: Yes.

THE COURT: Is that correct?

MR. [DEFENSE COUNSEL]: Yes, sir.

MR. [PROSECUTOR]: That is correct.

THE COURT: All right. Do you understand that by entering this plea to the charge that you're giving up certain Constitutional rights, specifically: The right to a trial before a judge or jury; the right to require the State to prove the charges against

you beyond a reasonable doubt; the right to assistance of counsel; the right to compel the attendance of witnesses on your behalf; the right to confront and cross-examine the witnesses against you; the right not to be compelled to incriminate yourself. Do you understand that by pleading guilty that you give up all of those Constitutional rights and there will not be a trial in your case?

THE DEFENDANT: Yes.

THE COURT: Now, in your case the State and your attorney have negotiated a sentence, which if the Court accepts will be the sentence imposed upon you. Is it your understanding on your plea of guilty -- may I have the plea form -- that the Court is going to adjudicate you to be guilty, in other words you're going to be convicted of a felony, do you understand that?

THE DEFENDANT: Yes.

THE COURT: That you're going to be sentenced to 40 years Florida State Prison with credit for the time that you've already served, and that will be on the date of your sentencing that I'll give you today, but as of today you have credit for how many years, Madam Clerk?

THE CLERK: 295 days.

THE COURT: You have credit for 295 days, do you understand that?

* * * [discussion of probationary terms and imposition of costs and expenses omitted] * * *

THE COURT: All right. Now Mr. Smith, do you understand that after you've completed the prison portion of your sentence, and you're placed on probation, if you violate any of the terms of your probation do you understand that the – if you come back before the Court on a violation, if you're found to be in violation of your probation then do you understand that your exposure would be the guidelines all the way up to life, whatever they are, do you understand that? In other words, whatever the guidelines are it would be to guidelines all the way up to life in prison, do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right, sir. And knowing all that, do you still wish to maintain your plea of guilty?

THE DEFENDANT: Yes.

THE COURT: Has anybody threatened, coerced, or intimidated you to get you to enter this plea of guilty?

THE DEFENDANT: No.

THE COURT: Has anybody, including your own attorney, promised that you'll receive any other sentence other than what we've just gone over?

THE DEFENDANT: No.

THE COURT: Has anyone promised you any hope or reward of better treatment, or anything else in order to get you to enter this plea?

THE DEFENDANT: No.

THE COURT: I'm showing you a plea form entitled plea of guilty and negotiated sentence, did you go over this plea form extensively with your attorney prior to entering your plea today?

THE DEFENDANT: Yes.

THE COURT: Did your lawyer answer all of your questions to your complete understanding regarding your case and any possible defenses to the charges that you might have?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with

your attorney's representation of you in this case?

THE DEFENDANT: Yes.

THE COURT: On the back of the plea form, on the line marked defendant, is that your signature?

THE DEFENDANT: Yes.

THE COURT: And did you sign your name on the plea form as your acknowledgment that you understand all the matters set forth on the plea form?

THE DEFENDANT: Yes.

THE COURT: As you're standing here today, are you currently or have you been within the last 24 hours under the influence of any alcohol, drug, medication, substance, or condition which might interfere with your understanding or appreciation of his plea and the consequences of it?

THE DEFENDANT: No.

THE COURT: Do you have any physical or mental defects that might prevent you from understanding what's taking place at this time?

THE DEFENDANT: No.

THE COURT: And counsel, are you aware of any mental health issues regarding your client?

MR. [DEFENSE COUNSEL]: Yes, sir. I think he has had some severe mental health issues. They have had him seen by a doctor, the doctor has told us that he is competent.

Also, Mr. Smith probably up to about two and a half months ago had been taking some psychotropic medications at the jail. He has been taken off those psychotropic medications at this time.

THE COURT: And that was at the doctor's direction?

MR. [DEFENSE COUNSEL]: That was at the doctor's direction from the jail. I discussed it with our doctor, our confidential doctor, and the confidential doctor did not disagree with it.

THE COURT: All right. But you have not had any information either through the doctors you've hired, or through any other physicians that have examined Mr. Smith that there are any, currently as he stands here today that there are any mental health issues that would affect is ability to understand what's going on?

MR. [DEFENSE COUNSEL]: Not his competence or his ability to understand what's going on, that's correct, Your Honor.

THE COURT: All right. And does the State have –

MR. [PROSECUTOR]: Your Honor, we are in receipt of no information that would indicate that.

THE COURT: All right. Mr. Smith, tell me in your own words what is your sentence going to be, how many years Florida State Prison are you going to receive?

THE DEFENDANT: Forty.

THE COURT: All right. And that will be followed by how many years of probation?

THE DEFENDANT: Ten.

THE COURT: Do you understand that by pleading guilty that give up your right to appeal all matters relating to the judgement in this case, including issues of guilt or innocence, or any pretrial motions that may have been filed on your behalf?

THE DEFENDANT: Yes, sir, I realize that.

THE COURT: Excuse me?

THE DEFENDANT: Yes.

THE COURT: Do you understand that the amount of prison time that you'll actually serve on that 40 year sentence is up to the Department of Corrections, and if your attorney or anyone else told you how much time that they think you're going to serve, that's just an estimate on their part, and it's not binding upon the Department of Corrections, do you understand that?

THE DEFENDANT: Yes.

THE COURT: If the time that you're required to serve turns out to be different from that estimate, you would not be allowed to use it as a basis to withdraw your plea, do you understand that?

THE DEFENDANT: Yes.

* * * [inquiry regarding citizenship omitted] * * *

THE COURT: How far in school did you go.

THE DEFENDANT: Bachelor's degree.

THE COURT: Can you read and write

the English language?

THE DEFENDANT: Yes.

THE COURT: Was there anything on the plea form that you didn't understand or comprehend?

THE DEFENDANT: No.

THE COURT: You understood everything on there --

THE DEFENDANT: Yes.

THE COURT: Have you had sufficient time to consider these charges against you?

THE DEFENDANT: Yes.

THE COURT: Have you had time to consider any possible defenses to the charges, and go over that with your attorney?

THE DEFENDANT: Yes.

THE COURT: Have you had time to consider the advice of your attorney?

THE DEFENDANT: Yes.

THE COURT: Have you had time to consider the waiver of your Constitutional

rights by entering this plea?

THE DEFENDANT: Yes.

THE COURT: And have you had sufficient time to reflect upon the consequences of this plea?

THE DEFENDANT: Yes.

THE COURT: Do you still wish to plead guilty?

THE DEFENDANT: Yes.

THE COURT: And you're waiving your right to a presentence investigation, is that correct?

THE DEFENDANT: Yes.

THE COURT: And you've gone over ths waiver form with your attorney, and that's your signature on the line marked defendant, is that right?

THE DEFENDANT: Yes.

THE COURT: So, do you understand that you're going to be sentenced without the benefit of that report?

THE DEFENDANT: Yes.

THE COURT: And that would have information that the Court could consider and letting the Court understand a little better about your background, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, do you understand that once I accept your plea of guilty that barring the Court finding that your plea wasn't freely and voluntarily entered, I would not allow you to withdraw the plea and this case would proceed to sentencing even over your objection, do you understand that?

THE DEFENDANT: Yes.

THE COURT: I want to make sure, in other words, if tomorrow you change your mind, you decide that you want to take the case to trial, or you wanted to try to work out a different deal with the State, or anything along those lines, or you just don't want to do this, it would be too late, do you understand that?

THE DEFENDANT: Yes.

THE COURT: And that this case would still be set for sentencing and we'd still go forward with the sentencing, even over your objection, do you understand that?

THE DEFENDANT: Yes.

THE COURT: And knowing all that, do you still wish to maintain your plea of guilty?

THE DEFENDANT: Yes.

THE COURT: All right. Let me ask counsel for the defense, have you reviewed the discovery disclosed by the State and determined whether or not discovery includes any listing or description of physical items of certain type of evidence that might be – that DNA might be obtained from?

MR. [DEFENSE COUNSEL]: Yes.

THE COURT: And you have reviewed that with your client, Mr. Smith?

MR. [DEFENSE COUNSEL]: I have gone over the physical evidence with him, I have gone over the issues, I have gone over the evidence linking him to this crime, Your Honor. And had there been a defense in this case, and what we were pursuing was an insanity defense and/or combination of insanity and self-defense. The issue of whether Mr. Smith was actually responsible for the killing in this case has not been an issue based on a witness that was in the other room, although he did not see the actual killing, he came outside immediately

thereafter and saw Mr. Smith there with blood on him. And then secondly, a statement by Mr. Smith to detectives shortly thereafter.

* * * [discussion of DNA and State's recitation of factual basis for plea omitted] * * *

THE COURT: All right. Then the Court finds that there is a factual basis, and further finds the defendant has freely and voluntarily entered his plea of guilty with a full understanding of the nature of the charge, the consequences of the plea, and the minimum and maximum possible sentence herein. I therefore accept the defendant's plea of guilty.

* * *

(R 116-130).

The above reflects that the trial court's inquiry leading to its ultimate acceptance of Petitioner's plea of guilty was not a mere pretense, but was detailed and tailored to the specifics of his case, including consideration of his mental health status. See *e.g.* Pate v. Robinson, 383 U.S. 375 (1966). As explained in Drope:

> The import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may,

> in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Id., 420 U.S. at 181, 95 S.Ct. at 909.

Here, in addition to defense counsel's representation that despite "some severe mental health issues" he had been professionally evaluated and deemed competent, Fla. R. Crim. P. 3.216(a), the trial court itself had the opportunity to observe the bearing and demeanor of Petitioner, whose answers were responsive, unambiguous, and appropriate to the questions posed. (R 116-130). Opposite Petitioner's assertion in now seeking certiorari that the trial court ignored matters regarding his mental health, the record effectively demonstrates that with knowledge thereof and input from Petitioner's counsel,[6] the court made a concerted and adequate inquiry of Petitioner's rational and factual understanding of the proceedings.

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[6] "Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with the closest contact with the defendant, is unquestionably a factor which should be considered." Drope, 420 U.S. at 177 n.13 (citations omitted).

as well as his ability to effectively consult with counsel. (R 116-130); see Dusky, 362 U.S. at 402. Upon its satisfaction thereof, the court ultimately accepted Petitioner's plea of guilty as being free and voluntary "with a full understanding of the nature of the charge, the consequences of the plea, and the minimum and maximum possible sentence herein." (R 130); see id. The court's findings are both reasonable and supported. (R 116-130).

As set out above, the "'bona fide doubt' regarding the Petitioner's competency[]" that is represented in the instant petition, (Pet. 18), is borne of less than accurate characterizations of matters in the state court. (R 116-130, 139; IB 12-13); U.S. Sup. Ct. R. 15.2; see *e.g.* Blackledge v. Allison, 431 U.S. 63, 71 (1977)(recognizing that a prisoner more often than not "has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea", courts have accorded great deference to a defendant's statements during a plea colloquy and been reluctant to allow a defendant to go behind his own sworn testimony). Petitioner's request for certiorari meets none of the criteria set forth in Supreme Court Rule 10(b) or (c); indeed, Petitioner does not identify any conflict between state courts of last resort, those of a United States court of appeals, or of this Court on any federal question, (Pet. 12-21), nor has the State identified any such conflict on the basis of the argument Petitioner has presented.[7]

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[7] See e.g. United States v. Ghane, 593 F.3d 775, 780-781 (8th Cir. 2010)(conflicting expert opinions on the issue of a

Here, Petitioner has made no colorable showing of a denial of due process; rather, the present case exemplifies the state court's adherence to the Constitutional guarantees addressed in Boykin, Drope and Dusky. In light thereof and the claim Petitioner now asserts being founded upon a stacking of inaccurate representations of the state court record, he has failed to demonstrate that there is any basis for his claims in fact, nor has he identified any conflict of law or other basis for this Court to grant certiorari on the question presented. See U.S. SUP. CT. R. 10; 15.2. "A petition for a writ of certiorari will be granted only for compelling reasons." U.S. SUP. CT. R. 10. No such compelling reasons are presented in the present case.

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defendant's competency does not bar or render a finding of competency to stand trial erroneous); State v. Thomas, 1999 WL 360752 (R.I. Super. 1999)(rejecting a claim that the defendant's statement during the plea colloquy "I've been off my medication" was a "red flag" which required the trial court to inquire further and the failure to do so invalidates the plea)(unpublished).

Question Presented 2

> Whether the Due Process Clause of the Fourteenth Amendment requires a court to *sua sponte* order a competency evaluation prior to accepting a guilty plea from a criminal defendant when the court is made aware that the defendant has had mental health issues but has been deemed competent to proceed by a defense expert. (Restated).

Explaining the methods of establishing whether a state court adjudication merits issuance of a writ of certiorari, in Adams v. Robertson, 520 U.S. 83 (1997), this Court stated:

> With "very rare exceptions," Yee v. Escondido, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531, 118 L. Ed. 2d 153 (1992), we have adhered to the rule in reviewing state-court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review. See Heath v. Alabama, 474 U.S. 82, 87, 106 S. Ct. 433, 436–37, 88 L. Ed. 2d 387 (1985); Illinois v. Gates, 462 U.S. 213, 217–19, 103 S. Ct. 2317, 2321–22, 76 L. Ed. 2d 527 (1983); McGoldrick v. Compagnie Generale Transatlantique,

309 U.S. 430, 434, 60 S. Ct. 670, 672, 84 L. Ed. 2d 849 (1940).

When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550, 107 S. Ct. 1940, 1948, 95 L. Ed. 2d 474, (1987), and the aggrieved party bears the burden of defeating this assumption, ibid., by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," Webb v. Webb, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894, 68 L. Ed. 2d 392 (1981). We have described in different ways how a petitioner may satisfy this requirement. See Street v. New York, 394 U.S. 576, 583–85, 89 S. Ct. 1354, 1361–62, 22 L. Ed. 2d 572 (1969). In some cases we have focused on the need for petitioners either to establish that the claim was raised, "'at the time and in the manner required by the state law,'" Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77–78, 108 S. Ct. 1645, 1650, 100 L. Ed. 2d 62 (1988) (quoting from Webb, supra, at 501, 101 S. Ct., at 1894) . . . .

In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair

> precision and in due time," New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S. Ct. 61, 63, 73 L. Ed. 184 (1928); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 n.9, 100 S. Ct. 2035, 2043 n. 9, 64 L. Ed. 2d 741 (1980).

Id., 520 U.S. at 86–87. Never having expressly or by clear intendment been presented to or addressed by the state courts of Florida, Petitioner's contention that a trial court is required under the Due Process Clause of the Fourteenth Amendment to *sua sponte* order a competency evaluation prior to accepting a guilty plea when it is made aware that the defendant "suffers from 'severe' mental health issues" is asserted here for the first time in seeking certiorari in this Court. (Pet. i).

Under Florida law, "[i]f the trial judge has reasonable grounds to believe that a criminal defendant is not competent to proceed, then the court must conduct a competency hearing." Carrion v. State, 859 So. 2d 563, 565 (Fla. 5th DCA 2003); see Fla. R. Crim P. 3.210(b). Also under Florida law, the issue of whether a trial court errs in failing to *sua sponte* conduct a competency hearing where such reasonable grounds are presented is a matter for direct appeal from entry of judgement and sentence, not cognizable in post conviction under Rule 3.850, Florida Rules of Criminal Procedure. Nelson v. State, ··· So. 3d ···, 35 Fla. L. Weekly S225, 2010 WL 1707218 (Fla. April 29, 2010); see Pardo v. State, 914 So. 2d 1057, 1062 (Fla. 2006); Fla. R. Crim. P. 3.850(b)("This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly

preserved, on direct appeal of the judgement and sentence.")). As set out above in addressing Question Presented I and in the Statement of the Case and Facts, not only was there an absence of reasonable grounds for the trial court to believe at the June 27, 2006 plea hearing that Petitioner was not competent to proceed based on its inquiry of Petitioner and input of defense counsel, but Petitioner did not take a direct appeal from judgement and sentence.

Even assuming *arguendo* that Petitioner's claims of ineffective assistance of counsel and involuntary plea in state post-conviction based on his alleged incompetency could be interpreted to include the issue offered in the second Question Presented for certiorari in this Court, it is plainly not cognizable as a matter of established Florida law under Rule 3.850, Florida Rules of Criminal Procedure. See Nelson; Pardo; Fla. R. Crim. P. 3.850(b). Thus, the issue of Petitioner's second Question Presented has never expressly or by clear intendment been presented to or addressed by the courts of Florida, much less in the only forum in which it is cognizable. Not having been addressed by or properly presented to any Florida court, there is no state court decision available for this Court to review. See Adams, 520 U.S. at 86–87; U.S. Sup. Ct. R. 10.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully Submitted,

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